In The High Court of Uttaranchal, at Nainital.

Second Appeal No. 1265/2001

(Old No. 120 of 1995)

Prem Chandra Singh S/o Ram Das Singhal,
R/o 27, Bangali Mandir Road,
Rishikesh, Dehradun ...Appellant.

Versus

1- State of U.P. through Collector, Dehradun.
2- Range Officer, Sheopuri Range,
Muni Ki Reti, Tehri
3- D.F.O. Tehari .. Respondents.

Sri Arvind Vashist, learned counsel for the appellant.
Sri Nand Prasad, learned Standing Counsel for the respondents.

Hon'ble B.C. Kandpal, J.

This is plaintiff's Second Appeal, U/S 100 of the C.P.C. against the judgment and decree dated 27-3-1995, passed by II Addl. Civil Judge, Dehradun in C.A. No. 17/1982, State Vs. P.C. Singhal, allowing the appeal and setting aside the judgment and decree of trial court (Munsif III Dehradun) passed in O.S. No. 61/1971.

2- Brief facts of the case are that the plaintiff/appellant has instituted a suit before the III Munsif, Dehradun against the defendant/respondent for permanent injunction. According to him he purchased land of Khasra No. 71/3 situate in Rishikesh through registered sale deed dated 8-3-1977 and since then he is owner in possession of the land in suit. On 9-3-1979 the plaintiff/appellant came to know that the defendants/respondents were raising

construction on a portion of his aforesaid land and when he asked the defendant/respondents not to encroach upon his land, they did not pay any heed to it, hence he instituted the suit for permanent injunction restraining the defendants/respondents not to raise any construction on the disputed land.

4- The defendants/respondents contested the suit by filing the W.S. alleging herein that at the spot export and check-post was being constructed within the area of 110 feet from the middle of the motor road. It was also alleged that the land belongs to the State. It was also alleged that the permission of the construction was obtained from the Public Works Department vide Letter No. 17 / XII-I dated 1-1-1976 of the Executive Engineer and the work was started on 26-2-1979 and it was already completed before institution of the suit.

5- The learned trial court framed relevantissues in the case and thereafter parties led their evidence.

6- The learned trail court on perusal of evidence of the parties and having heard the learned counsel for the parties, came to the conclusion that the construction has been raised beyond 50 feet from the middle of the road hence encroachment was made on the plaintiff's land. Therefore, the suit was decreed and the defendants/respondents were directed to restore the possession of the land to the plaintiff within one month and they were also restrained from interfering in the possession of the land in suit.

7- Feeling aggrieved, appeal was preferred by the State before the first appellate court, which was

allowed by it and the judgment and decree for the trial court was set aside.

8- Thereafter, the plaintiff/appellant preferred this second appeal, feeling aggrieved by the impugned judgment and decree dated 27-3-1995, passed by the first appellate court, before the Allahabad High Court, which was transferred to this court on creation of new State.

9- At the time of admission of appeal, the following substantial questions of law have been framed:-

1- Whether the absence of any pleadings, evidence and issue on the question of applicability or Road Side Control Act, the appellate court was justified in recording finding in that regard?.
2- Whether the finding of the appellate court as regards to the applicability of the Road Side Control Act, in absence of any constructions on the part of plaintiff/appellant is against the provisions of law?.

9- Heard learned counsel for the parties and perused the record.

10- Learned counsel for the plaintiff/appellant has argued that the disputed land belongs to the plaintiff/appellant and the provisions of U.P. Road Side Control Act, 1972(hereinafter referred as the 'Act') do not apply to this land as the land is beyond 50 feet from the middle of the road. On the other hand the learned Standing Counsel has refuted the argument of the learned counsel for the appellant and contended that the land comes within the 'Act'. He also contended

that the State has constructed the export check post on his own land.

11- The main question for determination in this case arise as to whether the disputed land belongs to the plaintiff/appellant or the same belongs to the State.

12- The plaintiff/appellant has a specific case that he had purchased 0.69 acre land of Khsra No. 71/3 situate in village Rishikesh by registered sale deed 8-3-1977. In the western side road of Muni-ki-Reti and in the south main road has been mentioned. According to him the disputed construction has been made on his land. On the other hand the case of the State/respondent is that the land belongs to State as it is within the area of the 'Act'. Perusal of the judgment of the first appellate court reveals that the first appellate court has deviated from the factual aspects of the case and decided the matter only on the point of applicability of the 'Act'. It has not considered the claim of the plaintiff/appellant elaborately discussing the evidence adduced by the parties before the trial court.

13- The record reveals that it is none of the parties' case that the Act is applicable in the instant case. None of the parties took any pleading in this regard and no issue has been framed on this point. No evidence is led by the parties pertaining to this aspect of the matter, hence the approach of the lower appellate court is absolutely foreign to the controversy in the case. The trial court has recorded a categorical finding that the construction has been raised beyond 50 feet from middle of the road hence there was an encroachment on the land belonging to plaintiff/appellant. The

appellate court has not touched this issue and diverted itself on the different issue which was not at all involved in this case.

14- In the present case construction has been made by the State and plaintiff/appellant has not raised any construction, therefore, the finding of the first appellate court as regards to the applicability of the Road Side Control Act, appears to be against the provisions of law.

15- The lower appellate court was not justified in recording the findings with regard to the question of applicability of Road Side Control Act in absence of any pleading, issue or evidence, available on record. There could not also be any application of Road Side Control Act, in absence of the pleading, issue or evidence of any construction on the part of plaintiff/appellant.

16- Accordingly the aforesaid issue requires re-consideration, and the matter is remanded back to lower appellate court to decide the matter in accordance with the evidence available on record. The first appellate court shall consider the aforesaid factual aspects in detail and then decide the first appeal after affording an opportunity of hearing to the parties.

17- In the result the appeal is liable to be allowed and the judgment and order passed by lower appellate court is set aside. The matter is remanded back to the first appellate court to decide it afresh in accordance with the law as well as the observations made in the body of judgment. As the matter relates to the year 1979, the first appellate court shall decide the appeal within a period of three months by taking the matter

on priority basis. The record of the court below be returned immediately.

(B.C. Kandpal, J)

Dated: 11-09-2006
ISB